SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 766

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

CLARENCE GREEN, TRADING AS GREEN'S DAIRY; G. P. JULIUS, TRADING AS JULIUS' DAIRY; JAMES SUTCLIFF, OF ARNOLD ICE CREAM COMPANY; GEORGE M. COOPER, TRADING AS QUALITY AND SERVICE DAIRY; R. E. NOGLE, TRADING AS SHILOH DAIRY; PAUL J. BECK, TRADING AS BECK'S DAIRY; R. H. EISENHART, TRADING AS EISENHART'S DAIRY; J. B. WARNER OF WARNER AND SONS' DAIRY; WALTER C. HOWE, TRADING AS HOWE'S DAIRY; PAUL E. LANDIS, TRADING AS LANDIS DAIRY; RYDER'S DAIRY, INC.; CHARLES A. HOAK, TRADING AS HOAK'S MODERN DAIRY; G. P. PARTHEMORE AND SONS, A PENNSYLVANIA CORPORATION; LOUIS J. MALLOY, OF MALLOY'S DAIRY; H. W. ERDMAN, OF LYKENS DAIRY; EDWARD HONICKER, TRADING AS HONICKER'S DAIRY; EARL H. FETTER, TRADING AS FETTER'S DAIRY (PLAINTIFFS), AND TITUSVILLE DAIRY PRODUCTS COMPANY, A PENNSYLVANIA CORPORATION (INTERVENING PLAINTIFF).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Specifications of Error.

The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania erred in holding that although the Milk Control Law of April 28, 1937,

P. L. 417, 31 PS Section 700j, does not violate the Constitution of the United States, this statute requires milk dealers who buy milk from producers to pay minimum prices prescribed by the Milk Control Commission of Pennsylvania but exempts milk dealers who sell or handle milk received on consignment from producers.

2. The Supreme Court of Pennsylvania erred in holding that although the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, does not violate the Constitution of the United States, it requires milk dealers who buy milk from producers to file bonds with the State for the protection of producers but exempts milk dealers who sell or handle milk received on consignment from producers from filing bonds.

3. The Supreme Court of Pennsylvania erred in sustaining the decree granting the injunction against the petitioner demanding from the respondents that the consignment contracts entered into between them and producers of milk comply with the bonding provisions and price-fixing provisions of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS section 700j, and the general orders of the Milk Control Commission of Pennsylvania so far as they relate to the purchase of milk.

ARGUMENT.

1. The construction of the Milk Control Law by the Supreme Court of Pennsylvania creates an arbitrary classification of milk dealers.

The construction of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, adopted by the Supreme Court of Pennsylvania, creates a classification of milk dealers that is arbitrary and capricious. Instead of having a relationship to the purposes of the Milk Control Law this

construction thwarts those purposes by enabling a milk dealer to avoid the requirements of the Act to pay minimum prices to producers.

The Supreme Court of the United States has recognized that milk dealers may be so classified as to fall into arbitrary groups between which no distinction for purposes of regulation can be made. In *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 56 S. Ct. 457, 80 L. Ed. 675 (1936), it was held that a New York statute allowing dealers in unadvertised milk in cities of over one million inhabitants to sell fluid milk at one cent per quart below that of milk sold under well advertised trade names, provided that the dealers were engaged in business at the date when the original statute became effective, and forbidding those who became dealers in unadvertised milk after that date to sell at a price lower than the price fixed for milk sold under well advertised trade names, violated the equal protection clause of the 14th Amendment, because the distinction was arbitrary and discriminatory. In the present case it is much clearer that the distinction is arbitrary and capricious.

The purpose of the Milk Control Law was to protect producers of milk so that an adequate supply of pure and wholesome milk would always be available to the public, by requiring that minimum prices be paid producers for milk and bonds be filed with the Milk Control Commission for the protection of producers. Nothing in this purpose can indicate the slightest intention to create a distinction such as that made by the Supreme Court of Pennsylvania in the present case. When we consider the facts of the present case it becomes even clearer that such a distinction, even if it had been made in the Act expressly, would make the statute unconstitutionally discriminatory. A milk dealer who gets his producer to sign a contract of consignment rather than obtain milk by the usual implied contract to buy at not less than minimum Commission prices, is given free-

dom of regulation so far as minimum prices to be paid producers and the protection of those prices are concerned. The Milk Control Commission of Pennsylvania may compel a milk dealer to pay his producers minimum prices when he buys milk, but the minute that the Milk Control Commission tries to enforce a price order the milk dealer announces that he is receiving his milk on consignment. Because the producers are not organized they individually sign consignment contracts to hold their market for milk during flush periods, and must remain under those contracts at all times or lose their markets because other producers also have signed contracts.

In a long line of decisions the Supreme Court of the United States has held that the equal protection clause of the 14th Amendment assures all persons freedom from arbitrary and discriminatory legislation. The Supreme Court of the United States has held that individuals may not be favored over corporations (*Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928)), or corporations over individuals (*Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929)). As the Supreme Court of the United States said in the latter case (278 U. S. at 522):

> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances."

Since Section 503 of the Milk Control Law, quoted above, makes the filing of a bond for the protection of milk dealers an accompaniment of an application for a license, the Commission in issuing licenses to thousands of milk dealers must inquire into each application to determine whether a bond need be filed or not with the application of a particular applicant. To grant licenses without the bonds would subject the Commission to suit for failure to perform its duty.

To refuse to issue a license unless the bond did accompany the application would tend to have the Commission in contempt of the Supreme Court of Pennsylvania if it withheld the license of a milk dealer protected by the decision of the Supreme Court of Pennsylvania. Surely the legislature could not have meant to place the Commission in such a dilemma.

As interpreted by the Supreme Court of Pennsylvania, however, the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, denies milk producers sending milk to dealers on consignment the protection of the price-fixing and bonding provisions of the Act. It denies milk dealers who buy milk from producers the equal protection of the laws by compelling them to obey provisions that the dealers operating on consignment need not respect. Finally it denies the equal protection of the laws to the Milk Control Commission of the Commonwealth of Pennsylvania by preventing the Commission from enforcing its orders on behalf of producers who ship milk on consignment and prevents the Commission from requiring bonds of those same dealers.

2. The Supreme Court of Pennsylvania should have followed its prior decisions or else overruled them.

The Supreme Court of Pennsylvania has never denied the constitutionality of the Milk Control Law or its predecessor, the Milk Control Board Law: *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A. 336 (1936); *Eisenberg Farm Products* v. *Milk Control Board*, 332 Pa. 34, 200 A. 854 (1938); *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 332 Pa. 15, 1 A. (2d) 775 (1938); *Harrisburg Dairies, Inc.* v. *Eisaman*, 338 Pa. 58, 11 A. (2d) 875 (1940).

In the present case the Supreme Court of Pennsylvania did not purport to overrule its prior decisions, but, as pointed out above, the distinction made creates a violation of the 14th Amendment to the Constitution of the United

States. Such a construction cannot be allowed to stand. Having once decided the constitutionality of the Milk Control Law it was incumbent upon the Supreme Court of Pennsylvania to interpret the provisions of the law in a constitutional manner. Therefore, if there possibly could be a constitutional construction of the Milk Control Law, the Supreme Court of Pennsylvania was bound to follow that construction.

3. The language of the Milk Control Law did not require the Construction adopted by the Supreme Court of Pennsylvania.

A review of the foregoing provisions of the Milk Control Law shows that the Milk Control Law did not necessarily exempt dealers handling milk on consignment. The definition of milk dealers includes anyone who handles milk for sale, shipment, storage, processing or manufacturing. Section 803 of the Milk Control Law, which provides for the fixing of minimum prices to be paid producers simply states:

> "The commission shall fix, by official order, the minimum prices to be paid by milk dealers to producers for milk: Provided, however, That the fixing of prices to be paid by milk dealers to producers for milk to be used solely in manufacturing shall be discretionary with the commission."

Surely this provision does not declare a distinction between dealers who buy milk and those who receive milk on consignment for sale.

The first sentence of Section 501 of the Milk Control Law which requires milk dealers to file bonds reads:

> "It shall be unlawful for a milk dealer to purchase milk from producers unless the milk dealer shall file with the commission a corporate surety, individual

surety, or collateral bond, approved by the commission."

The Supreme Court of Pennsylvania need only to have followed the construction of the word "purchased" adopted by the Supreme Court of the United States in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 579-580, 60 S. Ct. 993, 83 L. Ed. 1446 (1939), to maintain the constitutionality of the Milk Control Law.

Any peculiarities caused by the punctuation of the Milk Control Law disappear in determining its meaning because punctuation in Pennsylvania statutes is added after the statute has become a law: *Gyger's Estate*, 65 Pa. 312 (1870); *Commonwealth* v. *Shopp*, 1 Woodward (Pennsylvania) 123 (1863); *Eshelman's Appeal*, 75 Pa. 42 (1873); *Starck* v. *Union Central Life Ins. Co.*, 143 Pa. 45, 19 Atl. 703 (1890).

4. This case should be returned to the Supreme Court of Pennsylvania for reconsideration.

The instant case is one that leaves the state of the present Milk Control Law of Pennsylvania in doubt. Either the instant decision makes the whole act unconstitutional or else the act is unconstitutional and the present decision is erroneous. It would therefore seem that the proper remedy of the situation is for the Supreme Court of the United States to grant a writ of certiorari to the Supreme Court of Pennsylvania for review of the record and thereupon for the Supreme Court of the United States to remit the case to the Supreme Court of Pennsylvania for further consideration in accordance with an opinion of the United States Supreme Court to be filed setting forth the necessity that state statutes afford the equal protection of the laws that the 14th Amendment to the Constitution of the United States has guaranteed. This disposition of the case would

be in consonance with *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920 (1940), in which the Supreme Court of the United States returned a case to a state court for redecision where the meaning of the court's deduction was not certain enough for decision of the case by the Supreme Court of the United States.

Conclusion.

It is, therefore, respectfully submitted that the Supreme Court of Pennsylvania erred in failing to follow its prior decisions and the decisions of the Supreme Court of the United States upholding and interpreting the milk control laws of Pennsylvania and of the United States; that the decision of the Supreme Court of Pennsylvania in this case creates a statutory distinction that is arbitrary, capricious and denies the equal protection of the laws to certain producers, certain dealers and the Milk Control Commission of the Commonwealth of Pennsylvania; that it is necessary that milk control laws be similarly interpreted so that they can accomplish the great public good both within states and throughout the United States that they were designed to accomplish; and that a writ of certiorari should issue to the Supreme Court of Pennsylvania in order that the questions hereby presented may be reviewed by the Supreme Court of the United States.

Respectfully submitted,

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Deputy Attorney General,
CLAUDE T. RENO,
Attorney General.